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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 BRIAN M.,

10 Plaintiff,

11 v.

12 COMMISSIONER OF SOCIAL SECURITY,

13 Defendant.

Case No. C18-5397 MLP

ORDER AFFIRMING THE
COMMISSIONER

14 **I. INTRODUCTION**

15 Plaintiff seeks review of the denial of her application for Disability Insurance Benefits.
16 Plaintiff contends the administrative law judge (“ALJ”) erred in (1) weighing the medical
17 opinion evidence; (2) finding that Plaintiff’s impairments did not meet or equal a Listing;
18 (3) assessing Plaintiff’s residual functional capacity (“RFC”); and (4) evaluating the Vocational
19 Expert’s testimony at Step Five. (Dkt. ## 17-18.) As discussed below, the Court AFFIRMS the
20 Commissioner’s final decision and DISMISSES the case with prejudice.

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II. BACKGROUND

Plaintiff was born in 1964 and has a high school education. AR at 72. He has worked as a landscaping laborer, outboard motor mechanic, and long-haul truck driver. AR at 58. Plaintiff was last gainfully employed as a truck driver in February 2002. AR at 72.

On October 14, 2014, Plaintiff applied for benefits, alleging disability as of May 1, 2002. AR at 18. Plaintiff's applications were denied initially and on reconsideration, and Plaintiff requested a hearing. AR at 18, 105, 107. After the ALJ conducted a hearing on September 15, 2016, the ALJ issued a decision finding Plaintiff not disabled. AR at 62-90.

Utilizing the five-step disability evaluation process,¹ the ALJ found:

Step one: Plaintiff has not engaged in substantial gainful activity since his alleged onset date of May 1, 2002 through his date last insured of December 31, 2004.

Step two: Plaintiff has the following severe impairments: mild facet arthropathies of the lumbar spine with mild narrowing at L4-S1, degenerative joint disease of the right acromioclavicular ("AC") joint, post-traumatic stress disorder ("PTSD"), depression, and personality disorder.

Step three: These impairments do not meet or equal the requirements of a listed impairment.²

Residual Functional Capacity: Plaintiff can perform light work, except the claimant could occasionally climb ramps and stairs, but not climb ladders, ropes, and scaffolds. He could occasionally balance, stoop, kneel, crouch, and crawl. He could occasionally reach overhead with his bilateral upper extremities. He could perform simple, routine tasks that involve only superficial interaction with coworkers and the public. He should avoid concentrated exposure to vibration and to hazards.

Step four: Plaintiff cannot perform past relevant work.

Step five: As there are jobs that exist in significant numbers in the national economy that Plaintiff can perform, Plaintiff is not disabled.

AR at 15-34.

¹ 20 C.F.R. §§ 404.1520.

² 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 As the Appeals Council denied Plaintiff's request for review, the ALJ's decision is the
2 Commissioner's final decision. AR at 1-6. Plaintiff appealed the final decision of the
3 Commissioner to this Court. (Dkt. # 4.)

4 III. LEGAL STANDARDS

5 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social
6 security benefits when the ALJ's findings are based on legal error or not supported by substantial
7 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As
8 a general principle, an ALJ's error may be deemed harmless where it is "inconsequential to the
9 ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
10 (cited sources omitted). The Court looks to "the record as a whole to determine whether the
11 error alters the outcome of the case." *Id.*

12 "Substantial evidence" is more than a scintilla, less than a preponderance, and is such
13 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
14 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
15 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical
16 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
17 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may
18 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas*
19 *v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than
20 one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

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1. Standards for Reviewing Medical Evidence

The opinions of examining physicians are to be given more weight than non-examining physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Like treating physicians, the uncontradicted opinions of examining physicians may not be rejected without clear and convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining

1 physician only by providing specific and legitimate reasons that are supported by the record.
2 *Bayliss*, 427 F.3d at 1216.

3 Opinions from non-examining medical sources are to be given less weight than treating
4 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
5 opinions from such sources and may not simply ignore them. In other words, an ALJ must
6 evaluate the opinion of a non-examining source and explain the weight given to it. Social
7 Security Ruling (“SSR”) 96-6p, 1996 WL 374180, at *2. Although an ALJ generally gives more
8 weight to an examining doctor’s opinion than to a non-examining doctor’s opinion, a non-
9 examining doctor’s opinion may nonetheless constitute substantial evidence if it is consistent
10 with other independent evidence in the record. *Thomas*, 278 F.3d at 957; *Orn*, 495 F.3d at 632-
11 33.

12 2. *Andrew S. Hwang, M.D.*

13 Plaintiff’s assignments of error with respect to the ALJ’s consideration of Dr. Hwang’s
14 opinion are not clear. First, Plaintiff erroneously states that the ALJ gave “little weight to Dr.
15 Hwang’s opinions as Dr. Hwang last saw [Plaintiff] in 2010 (sic), over a year before his alleged
16 onset date.” (Dkt. # 17 at 6.) However, Plaintiff’s alleged onset date is May 2002. It is
17 undisputed that Dr. Hwang treated Plaintiff during the relevant period from May 1, 2002 to
18 December 31, 2004. AR at 92, 599, 610. Plaintiff claims the ALJ erroneously gave great weight
19 to a medical expert but “failed to follow Dr. Hwang’s restrictions concerning postural limitations
20 and the climbing of ramps, stairs, ladders, ropes, and scaffolds.” (Dkt. # 17 at 7.) However,
21 neither party has identified any such opinion given by Dr. Hwang during the relevant period, and
22 the Court is aware of none. As a result, Plaintiff has not shown any error in the ALJ’s failure to
23 discuss specific postural restrictions in relation to Dr. Hwang’s opinion or treatment notes.

1 Finally, Plaintiff mistakenly argues that the ALJ afforded Dr. Hwang's opinion both
2 "great weight" and "little weight." He first argues that Dr. Hwang's treatment notes
3 "demonstrate a pattern of chronic back pain and problems associated with it. Therefore, these
4 records should be given more than just little weight." (Dkt. # 17 at 6.) Subsequently, plaintiff
5 asserts that "the ALJ did not take into consideration Dr. Hwang's additional restrictions based on
6 [Plaintiff's] reported symptoms, despite giving Dr. Hwang's opinion great weight." (*Id.* at 8.)

7 Plaintiff has not shown that the ALJ committed any harmful error in evaluating Dr.
8 Hwang's opinion. In fact, the ALJ considered both Dr. Hwang's opinion regarding Plaintiff's
9 functioning and his treatment notes in detail. AR at 25-27. First, the ALJ noted that Dr. Hwang
10 performed a psychological examination of Plaintiff in August 2003, at which time Plaintiff had
11 been taking Remeron and Ambien for sleep troubles for the last four months "which have helped
12 him a lot." AR at 25-26, 615. The ALJ noted that objectively, Plaintiff exhibited a depressed
13 mood and affect, but he showed no signs of acute cognitive deficits and his mental status
14 examination was otherwise normal. AR at 26, 616. He was well-groomed, made good eye
15 contact, and was pleasant and polite. AR at 26, 616. The ALJ observed that Dr. Hwang's
16 assessment "does not show him administering specific cognitive testing to support the diagnosis
17 of ADHD. Rather, it appears that he based the diagnosis on the claimant's uncorroborated self-
18 reported history." AR at 26, 615-16.

19 The ALJ further noted that Dr. Hwang's treatment notes from August 2003 reflected that
20 Plaintiff "has been doing well" and "sleeps very well now" on his current doses of Effexor and
21 Remeron. AR at 26, 599. Plaintiff reported having gone camping with his girlfriend recently,
22 and having a good time. AR at 26, 599. During a follow up appointment two weeks later,
23 Plaintiff told Dr. Hwang that he got into a series of car accidents in the same night while driving

1 on a combination of his prescribed Lithium, Remeron, and Ambien. AR at 26, 599. In response,
2 Dr. Hwang discontinued Plaintiff's prescription for Ambien. AR at 26, 599. Treatment notes
3 from September 2003 indicated that Plaintiff was in the middle of a jury trial stemming from his
4 recent motor vehicle accidents. AR at 599. Plaintiff reported feeling "pretty good" on his
5 current medications. AR at 599. Based upon Dr. Hwang's statement that Plaintiff "[k]nows that
6 he cannot go back to work although time-loss comp was stopped last month," the ALJ noted,
7 "subjectively, [Plaintiff] stated he believed he could not return to work." AR at 26.

8 In a letter dated January 2004, Dr. Hwang opined that "I believe he may be able to handle
9 a job, if the job does not require too many interactions with others. I would recommend a work-
10 hardening program in a field that does not require frequent contact with a large number of
11 people." AR at 26, 610. Dr. Hwang stated that until Plaintiff completed some sort of program to
12 work in a field other than truck-driving, he believed Plaintiff was unable to work. AR at 610.
13 Based on these comments, the ALJ found it "apparent that Dr. Hwang believed the claimant's
14 psychological symptoms would not preclude full-time work activity. The residual functional
15 capacity in this decision includes a limitation for no more than superficial interaction with both
16 coworkers and the public." AR at 26. Thus, the ALJ did not reject Dr. Hwang's January 2004
17 opinion, but accommodated it in his RFC assessment. AR at 610.

18 Finally, the ALJ noted that Dr. Hwang's last treatment note created prior to Plaintiff's
19 December 31, 2004 date last insured was dated December 3, 2004. AR at 27, 601.³ The note
20 referenced the fact that Plaintiff had recently been in jail, a woman (apparently his mother) had
21 obtained a no-contact order against him, and Plaintiff was currently living in a car with his

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23 ³ The ALJ reasonably limited his analysis to the medical evidence that related to the period before
Plaintiff's insured status expired. AR at 23. The ALJ is not required to discuss evidence of limited
probative value, such as Dr. Hwang's treatment notes relating to Plaintiff's condition after his insured
status expired. AR at 601.

girlfriend. AR at 27, 601, 608. However, the ALJ observed that “like Dr. Hwang’s other notes, it contains no objective clinical observations that would support the claimant’s allegation of disability. When viewed longitudinally, Dr. Hwang’s notes contain the claimant’s subjective reports regarding the efficacy or inefficacy of his medications or allegations regarding his symptoms, but they do not include objective evidence such as Dr. Hwang’s assessment of the claimant’s mood, affect, or other clinical signs regarding his allegedly disabling mental impairments.” AR at 27. Thus, the ALJ concluded that “when viewed against the objective psychological consultative examinations discussed below, the undersigned finds Dr. Hwang’s treatment notes to have limited probative value for assessing the claimant’s residual functional capacity during the relevant period considered by this decision.” AR at 27.

Plaintiff has failed to show that the ALJ erred in assigning limited weight to Dr. Hwang’s treatment notes from the relevant period. Unless Dr. Hwang’s treatment notes expressed his opinion regarding specific functional limitations attributable to Plaintiff’s alleged impairments, the ALJ was not required to discuss Dr. Hwang’s treatment notes at all. The ALJ is required to discuss medical opinions, and explain the weight assigned. 20 C.F.R. 404.1527(b)-(c). Here, the ALJ reasonably explained that Dr. Hwang’s treatment generally documented Plaintiff’s subjective reports rather than any objective evidence, and therefore had limited probative value. AR at 27. *See Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003) (finding that an ALJ is “not required to discuss evidence that is neither significant nor probative”).

Similarly, the ALJ reasonably incorporated Dr. Hwang’s January 2004 opinion that Plaintiff “may be able to handle a job, if the job does not require too many interactions with others” into his RFC assessment by limiting him to simple, routine work that required only superficial contact with coworkers and the public. AR at 22, 26, 610. It is the purview of the

1 ALJ to resolve ambiguities in the medical evidence. *See Lewis v. Apfel*, 236 F.3d 503, 509 (9th
2 Cir. 2001). To the extent Dr. Hwang suggested that Plaintiff would be unable to work without
3 training in a field other than truck driving, the ALJ was not required to afford this opinion any
4 “special significance.” Opinions that would be dispositive of a case, *i.e.*, that would direct the
5 determination or decision of disability, are reserved to the Commissioner. *See* 20 C.F.R.
6 § 404.1527(d). Accordingly, the ALJ did not err by adopting Dr. Hwang’s January 2004 opinion
7 regarding Plaintiff’s social functioning limitations and declining to adopt his opinion on issues
8 reserved to the Commissioner.

9 3. *Mark A. Tomski, M.D.*

10 Plaintiff contends in a conclusory fashion that the ALJ failed to adequately consider the
11 opinion of treating physician Dr. Tomski in assessing Plaintiff’s RFC. (Dkt. # 17 at 6.) Plaintiff
12 does not identify what aspect of Dr. Tomski’s opinion he believes the ALJ should have adopted,
13 or how it would affect the RFC in this case. (*Id.*) In fact, Plaintiff does not address the ALJ’s
14 reasoning and findings with respect to Dr. Tomski at all. It is not enough merely to present an
15 argument in the skimpiest way, and leave the Court to do counsel’s work by framing the
16 argument and putting flesh on its bones through a discussion of the applicable law and facts. *See*
17 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003). Without more,
18 Plaintiff’s conclusory assertion that the ALJ erred in evaluating Dr. Tomski’s opinion is
19 insufficient to establish harmful error.

20 In November 2002, Dr. Tomski opined that Plaintiff had no physical issues that would
21 prevent him from working. AR at 368. Plaintiff’s physical examination was “completely
22 benign,” with intact reflexes and full ranges of motion. AR at 24, 368. Upon conferring with
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1 Plaintiff's mental health provider in January 2003, Dr. Tomski indicated that Plaintiff was only
2 restricted on psychological grounds from work. AR at 367-68.

3 The ALJ afforded "limited weight" to Dr. Tomski's opinion "to the degree that it could
4 be interpreted that he believed the claimant was unable to work due to psychological symptoms."
5 AR at 24-25. The ALJ pointed out that Dr. Tomski was a medical doctor, and not a psychiatrist
6 or psychologist. AR at 24, 367. The opinion of a specialist in a particular field is generally
7 entitled to greater weight than the opinion of a non-specialist. *See Molina*, 674 F.3d at 1112.
8 Here, the ALJ found that the "longitudinal record . . . including multiple psychological
9 consultative examinations do not objectively identify psychological barriers to fulltime
10 employment." AR at 24. Moreover, Dr. Tomski stated that any psychological inability to work
11 should "be confirmed" by Plaintiff's psychiatrist, to whom he would defer. AR at 25, 367.

12 Accordingly, to the extent that Dr. Tomski's opinion could be understood as indicating
13 that Plaintiff was psychologically disabled from working, the ALJ could reasonably discount Dr.
14 Tomski's opinion because it did not relate to his area of expertise. This was a specific and
15 legitimate reason, supported by substantial evidence, for discounting Dr. Tomski's comment.

16 4. *Evidence of Post-Traumatic Stress Syndrome*

17 Plaintiff contends that the ALJ erred in evaluating his PTSD impairment. (Dkt. # 17 at
18 6.) He states that his treating psychiatrist noted that Plaintiff experienced sleep disturbances as a
19 result of his PTSD. AR at 569. Moreover, Plaintiff asserts that "the accident feels like it just
20 happened which precluded [him] from working due to the trauma." (Dkt. # 17 at 7.)

21 Plaintiff identifies no limitations related to PTSD for which the ALJ did not account in
22 his RFC finding. As noted above, Dr. Hwang's treatment notes from August 2003 reflect that
23 Plaintiff was sleeping much better with his prescribed medications. AR at 359-60, 378, 406-07,

1 562, 592-93, 599, 616. Similarly, although Plaintiff reported to treatment providers that he
2 remembered the accident as if it were yesterday and he did not think he could work again as a
3 trucker, (AR at 356), this does not mean that his symptoms were so severe that he could not
4 perform other jobs available in the national economy. The ALJ rejected Plaintiff's testimony
5 regarding the severity of his symptoms in this case, and Plaintiff does not contest that finding.
6 AR at 22-32. As a result, Plaintiff has not met his burden of demonstrating harmful error with
7 respect to the ALJ's evaluation of his PTSD. AR at 24, 29-31.

8 B. The ALJ Did Not Err in Determining that Plaintiff's Impairments Did Not Meet or
9 Equal a Listing, or in Assessing Plaintiff's RFC

10 Plaintiff fails to articulate how he believes the ALJ erred in evaluating the Listings with
11 specificity. Plaintiff offers no plausible theory as to how his impairments satisfy the specific
12 criteria for any Listing, and he cites no evidence in support of his contention. (Dkt. # 17 at 4.)
13 As a result, he has waived the argument. *See generally Carmickle v. Commissioner*, 533 F.3d
14 1155, 1161 n.2 (9th Cir. 2008) (declining to address issues not argued with any specificity).

15 Because the Court has affirmed the findings of the ALJ as to Plaintiff's prior assignments
16 of error, it must also conclude that there was no error in determining Plaintiff's RFC or relying
17 upon that RFC to obtain testimony from a Vocational Expert at step five. Plaintiff has pointed to
18 no credible evidence, apart from Plaintiff's subjective complaints which were rejected by the
19 ALJ, establishing the additional limitations that he believes should have been included in the
20 RFC assessment. Accordingly, the ALJ did not err by omitting these additional limitations from
21 the RFC assessment. *See Carmickle*, 533 F.3d at 1164-65 (holding that an ALJ's RFC
22 assessment need not include impairments for which the medical records do not establish any
23 work-related impairments).

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Dated this 28th day of March, 2019.

MICHELLE L. PETERSON
United States Magistrate Judge